Petronas Dagangan Sdn Bhd v Omar bin Abdul Samad

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-14 OF 1995
ABDUL MALIK ISHAK J
16 OCTOBER 1995

Civil Procedure *— Injunction — Injunction to restrain defendant from conducting business on land — Whether leasehold owner was ex debitio justitiae entitled to injunction — Whether defendant had any legal right to remain on the land — Inter partes application — Whether there was a need for undertaking as to damages*

Land Law *— Licence — Gratuitous licence — Whether a bare licence without any contractual term in favour of the licensee can be revoked at will by the licensor — Whether there was equity or equitable estoppel protecting defendant's occupation of land*

Petronas Dagangan Sdn Bhd ('the plaintiff') was a leaseholder of a piece of land earmarked for a petrol kiosk. In 1986, the plaintiff built a petrol station and in turn entered into a dealership licence agreement with one Harun. Harun built a semi-permanent food stall ('the food stall') on part of the land with the oral approval of the plaintiff and the food stall was occupied by his brother-in-law, Omar bin Abdul Samad ('the defendant'). In 1993, due to a breach of the dealership licence agreement, the plaintiff by a letter terminated the agreement with Harun. The termination letter stated, inter alia, that the food stall should be vacated and demolished. As the defendant did not adhere to the notices to vacate the land given by the plaintiff, the plaintiff brought an action against the defendant claiming, inter alia, for an injunction to stop the plaintiff from conducting any business on the land and also to demolish the food stall. The plaintiff contended that a mutual agreement was reached between the parties that the food stall would be demolished once the local authorities built food stalls in and around the vicinity of the area. However, the defendant denied such agreement and claimed that, having regard to the fact that he had expended between RM25,000 to RM30,000 in constructing the food stall, he has an equitable right to remain on the land. Counsel for the defendant also submitted that the injunction should not be granted as the plaintiff had not given any undertaking as to damages.

Held, allowing the application and granting an ancillary order that an undertaking as to damages was not needed:

(1) The arrangement to construct the food stall on the plaintiff's land amounted in law to nothing more than a gratuitous licence. A bare licence without any contractual term in favour of the licensee can be revoked at will by the licensor. The undertaking by the defendant to stop operating the food stall upon the existence of other food stalls built by the authorities and the defendant's

knowledge of the existence of such stalls must be construed adversely against the defendant. Therefore, the defendant had no legal right to remain on the plaintiff's land after he was requested to move out by the plaintiff and in failing to do so, he was nothing more than a trespasser. The plaintiff had established itself as the proprietor of the land through the lease and ex debito justitiae he is entitled to the injunction which he sought for (see pp 399I, 400A–C; *Winter Garden Theatre Ltd v Millennium Productions Ltd* [1948] AC 173 and *Ng Yee Fong & Anor v EW Talalla* [1986] 1 MLJ 25 followed).

(2) The defendant's allegation about the money expended by him in constructing the food stall was a mere afterthought as no evidence was available in that regard. For the doctrine of equitable estoppel to apply, the defendant must prove that he had been led to expend money on the land under an expectation created or encouraged by the plaintiff that the defendant will as a result of that expenditure be able to remain on the land. In this case, there was no evidence for the application of any equitable doctrine in favour of the defendant as the facts presented were all for the plaintiff. There was no inducement and no expectation created by the plaintiff, either by word or conduct, in the mind of the defendant that he would be allowed to stay on the land for an indefinite period of time. The defendant had also not come to the court with clean hands. Therefore, it was crystal clear from the facts that equity could not be invoked to assist the defendant (see p 401A–D, F–G; *Inwards v Baker* [1965] 2 WLR 212 followed; *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105 distinguished).

(3) An undertaking as to damages would only apply in an ex parte application for an interim injunction. However, as the application here was made inter partes, there was no requirement for an undertaking as to damages (see pp 401I, 402H; *Fenner v Wilson* [1893] 2 Ch 656 followed).

[Bahasa Malaysia summary

Petronas Dagangan Sdn Bhd ('plaintif') adalah pemegang pajakan sebidang tanah yang diperuntukkan untuk pembinaan sebuah stesen minyak. Pada tahun 1986, plaintif telah membina sebuah stesen minyak dan seterusnya memasuki satu perjanjian lesen pengedaran dengan seorang bernama Harun. Harun telah membina sebuah gerai makanan sementara ('gerai itu') di atas sebahagian tanah itu dengan kebenaran lisan plaintif dan gerai itu telah diduduki oleh abang mertuanya, Omar bin Abdul Samad ('defendan'). Pada tahun 1993, oleh kerana terdapat suatu keingkaran perjanjian lesen pengedaran itu, plaintif melalui surat telah menamatkan perjanjian dengan Harun. Surat penamatan itu menyebut, antara lainnya, bahawa gerai itu mesti dikosongkan dan dirobohkan. Oleh kerana defendan tidak mematuhi notis-notis yang diberikan oleh plaintif untuk

mengosongkan tanah itu, plaintif telah membawa tindakan terhadap defendan untuk memohon, antara lainnya, suatu injunksi untuk menegah defendan daripada menjalankan apa-apa perniagaan di atas tanah itu dan merobohkan gerai itu. Plaintif mengatakan bahawa satu perjanjian bersama telah dicapai antara pihak-pihak bahawa gerai itu akan dirobohkan sebaik sahaja pihak berkuasa tempatan membina gerai-gerai makanan di sekitar kawasan itu. Walau bagaimanapun, defendan menafikan adanya perjanjian itu dan menegaskankan bahawa, memandangkan hakikat bahawa beliau telagh membelanjakan antara RM25,000 hingga RM30,000 untuk membina gerai itu, beliau mempunyai hak ekuiti untuk kekal menetap di tanah itu. Peguambela defendan juga berhujah bahawa injunksi itu tidak patut diberikan kerana plaintif tidak memberikan apa-apa akujanji berkenaan ganti rugi.

Diputuskan, membenarkan permohonan itu dan memberikan satu perintah sampingan bahawa akujanji berkenaan ganti rugi tidak diperlukan:

(1) Kebenaran yang diberikan untuk membina gerai itu di atas tanah plaintif hanyalah lesen percuma di sisi undang-undang. Satu 'bare licence' tanpa sebarang syarat berupa kontrak yang memihak pemegang lesen boleh dibatalkan sesuka hati pemberi lesen. Akujanji oleh defendan untuk memberhentikan operasi gerai itu setelah terdapat gerai-gerai lain yang didirikan oleh pihak berkuasa dan pengetahuan defendan tentang adanya gerai-gerai sedemikian mesti dilihat sebagai bertentangan dengan kes defendan. Maka, defendan tidak mempunyai hak yang sah untuk berada di atas tanah plaintif selepas beliau diminta keluar oleh plaintif dan kerana beliau gagal berbuat demikian, beliau cumalah seorang penceroboh. Plaintif telah membuktikan dirinya sebagai tuan punya tanah melalui pajakan itu dan ex debito justitiae dia berhak menerima injunksi yang dipohon itu (lihat ms 399I, 400A–C; *Winter Garden Theatre Ltd v Millennium Productions Ltd* [1948] AC 173 dan *Ng Yee Fong & Anor v EW Talalla* [1986] 1 MLJ 25 diikut).

(2) Pengataan defendan tentang wang yang dibelanjakan olehnya untuk membina gerai itu cumalah sesuatu yang difikirkan terkemudian kerana tiada keterangan yang ada berkenaan hal itu. Supaya doktrin estopel ekuiti dapat digunakan, defendan mesti membuktikan bahawa dia telah didorong supaya membelanjakan wang ke atas tanah itu dengan harapan yang diwujudkan atau digalakkan oleh plaintif bahawa defendan sebagai hasil perbelanjaan itu dapat terus berada di tanah itu. Dalam kes ini, tidak terdapat keterangan untuk menyokong pemakaian apa-apa doktrin ekuiti yang memihak defendan kerana fakta yang diberikan semuanya memihak plaintif. Tidak terdapat dorongan dan tiada harapan diberikan oleh plaintif, sama ada melalui perkataan atau perbuatan, kepada defendan bahawa dia akan

dibenarkan tinggal di atas tanah itu untuk masa yang tidak ditetapkan. Defendan juga tidak datang ke hadapan mahkamah dengan tangan yang bersih. Maka, adalah jelas daripada fakta yang diberikan bahawa ekuiti tidak boleh digunakan untuk menolong defendan di sini (lihat ms 401A–D, F–G; *Inwards v Baker* [1965] 2 WLR 212 diikut; *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105 dibeza).

(3) Suatu akujanji mengenai ganti rugi cuma terpakai dalam suatu permohonan ex parte untuk injunksi sementara. Walau bagaimanapun, oleh kerana permohonan di sini dibuat inter partes, tidak terdapat keperluan untuk akujanji mengenai ganti rugi (lihat ms 401I, 402H; *Fenner v Wilson* [1893] 2 Ch 656 diikut).]

Notes

For cases on injunction to restrain, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1490–1507.

For a case on gratuitous licence, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1989.

Cases referred to

Cayman Development (Kedah) Sdn Bhd v Puah Kiew & Ors [1990] 3 MLJ 110

Fenner v Wilson [1893] 2 Ch 656

Inwards v Baker [1965] 2 WLR 212

Ng Yee Fong & Anor v Tallalla, EW [1986] 1 MLJ 25

Oh Kuang Liang v Associated Wood Industries Sdn Bhd [1995] 2 CLJ 961

Sivaperuman v Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150

Tam Kam Cheong v Leong Kon Sang, Stephen & Anor [1980] 1 MLJ 36

Winter Garden Theatre Ltd v Millennium Productions [1948] 1 AC 173

Yong Tong Hong v Siew Soon Wah & Ors [1971] 2 MLJ 105

Legislation referred to

Rules of the High Court 1980 O 29

Specific Relief Act 1950 s 52(3)(d)

Zuraida bte Salleh (*Albar, Zulkifly & Yap*) for the plaintiff.

Nordin bin Hussin (*Tia & Nordin*) for the defendant.

Abdul Malik Ishak J: This was an application by the plaintiff under O 29 of the Rules of the High Court 1980 ('the RHC') for the following prayers (encl 15):

(a) Bahawa suatu injunksi untuk menegah defendan (sama ada secara individu atau melalui pekerjanya atau melalui ejennya) dari menjalankan kegiatan

perniagaan di atas hartanah HS(D) No 6558 PTB No 805, Mukim Tanjung Surat, Daerah Kota Tinggi, Johor;

(b) bahawa defendan dengan serta merta merobohkan bangunan yang telah didirikan separuh kekal di atas hartanah tersebut;

(c) kos di dalam kausa; dan

(d) lain-lain relief yang difikir adil dan suaimanfaat oleh mahkamah yang mulia ini.

The registered proprietor of the land is the Lembaga Kemajuan Johor Tenggara ('the Lembaga') and that land (a leasehold land of 60 years) measured 1 acre 1 rood 00 pole which is equivalent to 54,450 square feet. The land is earmarked for a petrol kiosk and this is clearly set out as one of the conditions to the land as per the land title (exh A of encl 14). The Lembaga leased the whole portion of the land to Mohamad @ Harun bin Tahar ('Harun') from 6 May 1985 to 5 May 2045. Harun in turn leased the whole portion of the land to the plaintiff for a period of 30 years beginning from 30 December 1986 and ending on 30 November 2016. The plaintiff wasted no time and built a Petronas petrol station there and, on 10 March 1987, the plaintiff entered into a dealership licence agreement with Harun. That dealership licence agreement enabled Harun to enter into the plaintiff's petrol station and make use of the equipment thereof and also to sell the plaintiff's products upon the terms and conditions stipulated therein. Harun's dealership with the plaintiff ended on 20 February 1993 because of a breach of cl 12(1)(a) of the dealership licence agreement and this is clearly reflected in the letter addressed to Harun by the plaintiff (exh I of encl 22, 'termination letter'). The termination letter makes for interesting reading and in it, it was stated, inter alia, that the semi-permanent food stall built by Harun on part of the land should be vacated and demolished and further that the costs of such demolition should be borne by Harun, failing which the plaintiff threatened legal action. It transpired that the semi-permanent food stall was built in 1987 by Harun and eventually the defendant, who is the brother-in-law of Harun, occupied it.

Both Harun and the defendant by affidavits denied that they agreed verbally with the plaintiff that the semi-permanent food stall would be demolished when the authorities built food stalls in and around the vicinity of the area. In the same vein, both Harun and the defendant deposed that the semi-permanent food stall was built at the cost of RM25,000 to RM30,000. Harun particularly emphasized that when the plaintiff took charge of the petrol station in 1993 they knew of the existence of the semi-permanent food stall on part of the land. The defendant pathetically deposed that he earned RM300 per day selling food at that semi-permanent food stall and that that was his livelihood. Furthermore, the defendant deposed that his food business there did not in any way interfere with the plaintiff's affairs in running the petrol station and, more importantly, the defendant deposed that he had equity as he had expended money. It was plain outright inhumane on the plaintiff's part to simply oust the defendant and demolish that semi-permanent food stall, so deposed the defendant in

his affidavit-in-reply affirmed on 17 August 1995. The defendant stressed a point to the effect that the land would revert back to Harun on 30 November 2016 when the lease between Harun and the plaintiff expired on that date and, on this basis, it was sought to argue that it was unreasonable for the plaintiff to apply to this court to demolish the semi-permanent food stall and to evict the defendant forthwith. The defendant deposed in strong terms that the allegations by the plaintiff that the defendant used the plaintiff's electricity and syphoned the water supply from the petrol station for the defendant's use were totally baseless. The defendant averred that he used a generator to generate electricity and that he paid the Lembaga for the consumption of water. It was the defendant's complaint that the Lembaga as the registered proprietor of the land did not take draconian steps to oust him out like what the plaintiff is doing to him.

The plaintiff by a letter dated 2 January 1990 (exh C of encl 15) gave notice to Harun to remedy the violation occasioned by the defendant by removing and demolishing the semi-permanent food stall. That letter also instructed Harun not to rear chickens in and around the vicinity of the petrol station in view of the Visit Malaysia 1990 campaign. By notice dated 1 November 1992, which notice bore the 'without prejudice' tag as envisaged in *Oh Kuang Liang v Associated Wood Industries Sdn Bhd* [1995] 2 CLJ 961, the plaintiff reminded the defendant to vacate the premises within two weeks from the date of the notice. The plaintiff also adverted in that notice to the clandestine activities of the defendant:

> 'membuat penyambungan talian letrik dari set janakuasa stesen untuk mendapat bekalan letrik ke kediaman tersebut dan mengambil bekalan air dari stesen tanpa izin dari pihak kami'.

By a telegram dated 17 November 1992, the plaintiff reminded the defendant of their notice dated 1 November 1992 which the defendant sought to ignore and continued to remain on the land in that semi-permanent food stall. Again, by a letter dated 11 December 1992 addressed to the defendant, the plaintiff drew the defendant's attention to the existence of a clutter of food stalls known as 'Hentian Mas' and the defendant was once again requested to vacate his semi-permanent food stall. Finally, the plaintiff's solicitors gave a notice to vacate and demolish the semi-permanent food stall on the land to the defendant which required the defendant to act within 14 days from the date of the notice. That notice was dated 28 June 1994.

From the tenor of the defendant's affidavit and that of Harun for that matter, they both sought to describe the disputed building on the land as a temporary structure but the photographs in exh B of encl 14 defy that sort of description and it pointedly and clearly showed that the disputed building was of a permanent nature and, accordingly, I so hold to that effect.

Now, what is the law applicable to the facts as narrated above. It must first be pointed out that an interlocutory mandatory injunction before trial is sparingly granted and if granted it would be in exceptional

circumstances. Abdoolcader J (as he then was) in *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 aptly said at pp 151–152:

> I have earlier pointed out that the interlocutory injunction granted is mandatory in effect and substance and the dismissal of the appellant has been referred to and is pending before the Industrial Court as a trade dispute. In *Harold Stephen & Co Ltd & Ors v Post Office* [1978] 1 All ER 939, a decision of the Court of Appeal in England in July last year, Geoffrey Lane LJ, said at p 944:
>
> > 'Finally, and most seriously as I see it, the ground on which I would primarily base my decision would be this. It can only be in very rare circumstances and in the most extreme circumstances that this court should interfere by way of mandatory injunction in the delicate mechanism of industrial disputes and industrial negotiations.'

KC Vohrah J, in *Cayman Development (Kedah) Sdn Bhd v Puah Kiew & Ors* [1990] 3 MLJ 110 observed as follows at p 112:

> In *Manchester Corp v Connolly* [1970] 1 All ER 961, (see also *Lee Ying Piew & Ors v MP Tan Electrical & Credit Sdn Bhd* [1989] 3 MLJ 228), it was held that an injunction may be granted even if it would give the plaintiff the whole remedy before the action is tried where plainly there is no defence to the action and the only object in raising the defence is to cause delay.

Salleh Abas FJ (as he then was) in *Tam Kam Cheong v Stephen Leong Kon Sang & Anor* [1980] 1 MLJ 36 (FC) in trenchant terms had this to say on the question of interlocutory mandatory injunction at p 42:

> The grant of this injunction is entirely discretionary and it is certainly not issued as a matter of course. (See *Morris v Redland Bricks Ltd* [1970] AC 653 at p 665.) In exercise of its jurisdiction on the issue of mandatory injunction, the court has to be extremely cautious and must act with moderation as the jurisdiction has to be exercised sparingly. (See *Wrotham Park Estate v Parkside Home* [1974] 2 All ER 321 at p 337.) It can be issued only in cases where the injury done for the prevention or rectification of which injunction is sought cannot be adequately compensated by pecuniary damages. On the other hand, there is no rule that this injunction must be refused upon the mere ground that the injury had been completed before the suit was filed. Every case has to depend upon its own circumstances, and it is a generally accepted view that the court will not interfere by way of mandatory injunction except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld. (See *Durell v Pritchard* (1866) LR 1 Ch App 244 at p 250.) The question of cost to the defendant in carrying out the injunction is also a relevant factor. Such cost must be weighed or balanced with the extent of the injury done to the plaintiff (see *Morris v Redland Brick Ltd*).

Section 52(3)(d) of the Specific Relief Act 1950 speaks of a situation where the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, in which extent the court may grant a perpetual injunction where it is probable that the pecuniary compensation cannot be got for the invasion.

In so far as the permanent structure which is the subject of dispute is concerned, two letters between the defendant and the plaintiff should be reproduced in detail. The first letter which the defendant wrote to the plaintiff was dated 15 November 1992 and it is worded thus:

Omar Abdul Samad
805, Desaru
Bandar Penawar
81900 Kota Tinggi
Johor

Pengurus
Petronas Dagangan Sdn Bhd
Pejabat Wilayah Selatan
Tingkat 1
Bangunan Petronas
Bandar Baru Uda
81200 Johor Bahru

Tuan,

Gerai/Warong Makanan Di tapak Stesyen PSS Desaru

Surat tuan bertarikh 1 November 1992 dirujuk.

Untuk makluman tuan bahawa gerai/warong makan tersebut telah didirikan oleh En Harun pada tahun 1987. Apa yang saya difahamkan bahawa ianya adalah merupakan sementara untuk kemudahan pekerja-pekerja stesyen, kerana tempat menjual makanan adalah terlalu jauh dari lokasi stesyen.

Untuk menyelesaikan perkara ini saya mohon tempoh enam bulan bagi membolehkan saya menemui dan berunding dengan En Harun.

Semoga mendapat pertimbangan yang sewajarnya dari pihak tuan.

Sekian, terima kasih.

Yang benar,
—tt—

(Omar Abdul Samad)

The second letter which was written by the defendant to the plaintiff dated 23 November 1992 is worded in the following fashion:

Omar bin Abdul Samad
805, Desaru
Bandar Penawar
81900 Kota Tinggi
Johor

Pengurus
Petronas Dagangan Sdn Bhd
Pejabat Wilayah Selatan
Tingkat 1
Bangunan Petronas
Bandar Baru Uda
81200 Johor Bahru

(Up: En Aliyassa Md Zain)

Tuan,

Gerai/Warong Makan Di tapak Stesyen PSS Desaru

A Saya telah menerima telegram dari pihak tuan bertarikh 18 November 1992 dan saya memahami apa yang dimaksudkan.

Suka saya maklumkan bahawa saya bukannya engkar pada perintah, tetapi apa yang saya fahami bahawa kebenaran secara lisan telah diberikan kepada En Harun untuk warong itu beroperasi sementara belum ada kedai makan yang dibenarkan beroperasi di sekitar yang berhampiran dengan stesyen.

B Ini bererti saya telah membuat satu pengorbanan berkhidmat kepada pekerja-perkerja stesyen supaya mudah mendapatkan makanan dan minuman.

Oleh yang demikian sebelum adanya kedai makan yang sahih beroperasi di sekitar berdekatan dengan stesyen maka izinkanlah saya terus menjalankan khidmat menjual makanan dan minuman di warong tersebut.

C Sekiranya telah ada kedai makan yang sahih sama ada ia didirikan oleh pihak perbadanan atau Petronas sendiri beroperasi di sekitar berdekatan lokasi stesyen, maka saya bersedia berundur diri dan menghentikan operasi penjualan makanan dan minuman di situ, dan berkemungkinan saya akan memohon untuk mendapatkan gerai makan sahih berkenaan untuk beroperasi.

Berhubung dengan penggunaan air dan kuasa letrik saya bersedia
D mematuhi untuk membayar kepada pihak tuan dengan kadar yang berpatutan pada setiap hujung bulan. Untuk itu, sila tuan kemukakan satu cadangan jumlah bayaran yang berpatutan untuk saya jelaskan bagi kedua-dua bahan tersebut.

Semoga mendapat pertimbangan yang sewajarnya dari pihak tuan.

E Sekian, terima kasih.

Yang benar,
—tt—

(Omar Abdul Samad)

F sk: En Harun Taha.

Three things can be highlighted from the contents of the second letter, namely:

(1) oral approval was granted to Harun to operate the food stall;

G (2) an undertaking by the defendant to stop operating the food stall once the authorities built a chain of food stalls in and around the vicinity of the petrol station; and lastly

(3) the willingness to pay at reasonable rates for the plaintiff's water and electricity utilized by the defendant at the end of each month.

H It is beyond peradventure that the second letter as produced and highlighted above cut across the very fabric of both Harun and the defendant's affidavits. The denials by the defendant and that of Harun too in their affidavits in regard to items (1) and (3) as set out above would clearly expose the blatant attempts by the defendant to delay and impede the plaintiff's right of peaceful occupation of the land. Plainly there is no
I defence to the action. The arrangement under which Harun was permitted to construct the 'gerai/warong' on the plaintiff's land amounted in law to nothing more than a gratuitous licence. In law, a bare licence without any contractual term in favour of the licensee can be revoked at will by the

licensor (see *Winter Garden Theatre Ltd v Millennium Productions Ltd* [1948] AC 173). The undertaking by the defendant to stop operating the food stall upon the existence of other food stalls built by the authorities and the defendant's knowledge of the existence of such stalls known as 'Hentian Mas' must be construed adversely against the defendant. It is my judgment that the defendant here had no legal right to remain on the plaintiff's land after he was requested to move out by the plaintiff. The several notices adverted to in the early part of this judgment were reasonable in nature and once the defendant was in receipt of those notices and he continued to remain stubbornly on the land, he is considered nothing more than a trespasser. The plaintiff has established itself as the proprietor of the land through the lease and ex debito justitiae he is entitled to the injunction (see *Ng Yee Fong & Anor v EW Talalla* [1986] 1 MLJ 25) which he sought for.

Haji Nordin bin Hussin, learned counsel for the defendant, argued that the defendant had incurred expenditure in constructing the 'warong/gerai' and, consequently, he had an equitable right to remain on the land as long as he wished and that the plaintiff was not entitled to vacant possession of the portion of the area of the land as occupied by the defendant. But, somehow, the defendant in the two letters quoted above did not advert, at all, as to the expenditures incurred by him in constructing the 'warong/gerai' and, consequently, the figures of RM25,000 to RM30,000 being the purported costs of constructing the 'warong/gerai' as adverted to in the affidavits of Harun and the defendant must be construed as mere afterthoughts. Now, even if I were receptive to counsel's submission on this point, I must, at the outset, say that there was a misappreciation of the doctrine of equitable estoppel. 16 *Halsbury's Laws of England* (4th Ed) at para 1474 contains an illuminating passage on the subject of 'Elements in the Estoppel' which merits reproduction. It is this:

> When A stands by while his right is being infringed by B the following circumstances must as a general rule be present in order that the estoppel may be raised against A: (1) B must be mistaken as to his own legal rights; if he is aware that he is infringing the rights of another, he takes the risk of those rights being asserted; (2) B must expend money, or do some act, on the faith of his mistaken belief; otherwise, he does not suffer by A's subsequent assertion of his rights; (3) acquiescence is founded on conduct with a knowledge of one's legal rights, and hence A must know of his own rights; (4) A must know of B's mistaken belief; with that knowledge it is inequitable for him to keep silent and allow B to proceed on his mistake; (5) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal right.

It is clear from the passage quoted above, for the doctrine of equitable estoppel to apply the defendant here must prove that he has been led to expend money on the land under an expectation created or encouraged by the plaintiff that the defendant will as a result of that expenditure be able to remain there on that land. For equity to emerge and put its beautiful head above the water, so to speak, and intervene on behalf of the defendant there must be evidence of some inducement or encouragement by the plaintiff or some expectation held out to him by the plaintiff on the strength of which the

A defendant had expended money on the land. I have anxiously examined all the affidavits filed by the parties but I was unable to find an iota of evidence for the application of any equitable doctrine in favour of the defendant. Indeed, there was not a single conduct on the part of the plaintiff which induced the defendant to build the 'warong/gerai' in the belief that rights in perpetuity would be acquired by the defendant. On the facts also there was not an iota of evidence to ground, for the benefit of the defendant, the doctrine of estoppel. The facts as presented itself were all for the plaintiff. It was Harun who built the 'warong/gerai' initially on the understanding that it would be demolished once a row of food stalls have been built by the authorities and later when the defendant occupied the 'warong/gerai' he too had knowledge of this understanding. There was no expectation created by the plaintiff, either by word or conduct, in the mind of the defendant that he would be allowed to stay on the land for an indefinite period of time by the plaintiff. The facts in this case are poles apart from *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105 where the appellant there had expended money on the land of another in the expectation of being allowed to remain in occupation and an agreement was drawn up to the effect that the tenancy was to endure as long as the tenant wished to occupy and from this there was no uncertainty in the minds of the parties as to the period of the lease. The then Federal Court in allowing the appeal held that:

> ... the court would give effect to the expressed intention of the parties by holding that the agreement was one for the grant of as long a lease as the law allows which, under the provisions of s 221(3)(b) of the National Land Code 1965, is a maximum period of 30 years.

Inwards v Baker [1965] 2 WLR 212 at p 213 was also discussed in *Yong Tong Hong*'s case. The principle in *Inwards v Baker* may be summarized as follows: where a person has expended money on the land of another in the expectation, induced or encouraged by the owner, an equity was created such that the court would protect his occupation of the land and determine in what way the equity so arising could be satisfied. It is crystal clear that, on the facts, equity could not be invoked to assist the defendant here. Incidentally, the conduct of the defendant here is relevant and must be viewed with circumspection when the defendant, through his learned counsel, sought to seek relief in equity. From the affidavits, the defendant had come to court with unclean hands. The defendant said that he built a temporary structure on the land but the photographs showed otherwise. The defendant too had initially denied using the plaintiff's water and electricity but in his letter dated 23 November 1992 he not only admitted to using these facilities but also offered to pay for them at the rates as imposed by the plaintiff provided these rates were reasonable.

Counsel for the defendant argued that there was no undertaking as to damages. Cik Zuraida Salleh argued forcefully for the plaintiff to the effect that an undertaking as to damages would only apply for an application made ex parte and not, as here, inter partes. The headnote in *Fenner v Wilson* [1893] 2 Ch 656 reads as follows:

> The undertaking in damages usually inserted in an order granting an interim injunction should not be inserted in an interim order in a patent action restraining one of the parties from publishing threats of legal proceedings for infringement of his alleged patent.

Kekewich J, delivering the judgment of the court in *Fenner v Wilson* had this to say at p 658:

> As he points out in his own language, the object in insisting upon an undertaking in damages is that if, by misadventure through the judge not knowing all the facts, such as being misled by the evidence before him or by the arguments of counsel, an injunction is granted on an interlocutory application which ought not to have been granted, then the defendant is entitled to some remedy in damages; as, for example, where, in consequence of the injunction, the defendant has lost the proper season for building, or where it turns out, in a case of ancient lights, that the defendant has not in fact interfered with his neighbour's light at all. In all such cases, it is right to protect the defendant against the damage he may suffer by the wrongful issue of an injunction, and therefore the court exacts an undertaking in this form — which is the form adopted, mutatis mutandis, in the present instance — (1 *Seton on Decrees* (5th Ed) at p 452): 'The plaintiff, by his counsel, undertaking to abide by any order of this court may make as to damages, in case this court should hereafter be of opinion that the defendants shall have sustained any, by reason of this order, which the plaintiff ought to pay.'

In another part of his judgment, particularly at p 659, Kekewich J said :

> But, though the injunction is interlocutory in another sense — that is to say, it may not be an order which has hereafter to be considered: it may not be an order leaving anything for the court to consider at a future time. The only question here can be whether the matter is finally concluded, or whether there is a 'hereafter' within the undertaking.

Yet in another part of his judgment, Kekewich J, at the same page continued in this vein:

> This order is appealable of course, but it is a final order: there is no 'hereafter' in it. My decision, though subject to appeal, is not open to review at any time by me. Therefore it is impossible to say it is not a final order. Accordingly, the ordinary form of interlocutory injunction is not applicable, and there ought to be no undertaking here.
>
> The minutes of the order, as given out by the registrar, must therefore be varied by striking out the undertaking as to damages.

It is my judgment that though *Fenner v Wilson* was decided in the context of a patent case, yet the principles enunciated therein are germane and should be applied to the present case; and when so applied there was thus no requirement for any undertaking as to damages.

Lest I be accused of an oversight, counsel for the defendant advanced an argument that there was delay on the part of the plaintiff to file their writ, to be exact this was on 13 January 1995. The plaintiff, it was alleged, slept on their rights in not instituting the matter in court expeditiously. Laches were said to have been committed by the plaintiff. But was there

A something more than a mere delay. Did the plaintiff delay in asserting their rights so as to give rise to an inference of assent? The plaintiff's counsel rightly pointed out that there were several attempts between the parties to settle the matter amicably; but all these came to nought. It is my judgment that the plaintiff had not been guilty of laches and what the defendant was
B really complaining about was nothing more than to stir a storm in the teacup.

For the reasons adumbrated above, I allowed the plaintiff's application in encl 15 with costs. The defendant by way of an injunction was also prohibited either individually or through his agent or his workers from conducting any business on the land. It was further ordered that the semi-
C permanent food stall on the land as reflected in the photographs be demolished within six months from the date of the order of this court and the costs incurred therein should be borne by the defendant. In the event the defendant refused to demolish the semi-permanent food stall within six months from the date of the order of this court, then the plaintiff is
D entitled, on their own accord, to demolish the semi-permanent structure as aforesaid and, if this were to happen, the plaintiff is entitled to the costs incurred therein by way of an assessment by the senior assistant registrar. There was a further ancillary order that the plaintiff need not give an undertaking as to damages.

E *Application allowed.*

Reported by Ng Kian Pin

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